Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1413

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare;
MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners,

vs.

LOUISE BOND, individually and on behalf of her minor children;
ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association;
SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association;
NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association, individually and on behalf of all others similarly situated,

Respondents.

BRIEF OF THE STATE OF ILLINOIS AMICUS CURIAE

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TABLE OF CONTENTS

	PAGE
MOTION TO FILE AMICUS CURIAE BRIEF	iii
INTEREST OF THE AMICUS	1
ARGUMENT:	
No Award Of Attorney's Fees Is Appropriate Under 42 U.S.C. § 1983 In The Absence Of Statutory Authorization	2
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

Aleyska Pipeline Service Co. v. The Wilderness Society, et al., 421 U.S. 420, 44 L.Ed. 2d 141, 95 S.Ct. 1612 (1975) 2

Fitzpatrick v Bitzer, ... U.S. ....., 49 L.Ed. 2d 614, 96 S.Ct. 2666 (1976) 7, 8, 10

Edelman v. Jordan, 415 U.S. 651, 39 L.Ed. 2d 662, 94 S.Ct. 1347 (1974) 7, 13

Jagnandan v. Giles, President of Mississippi State University, 538 F.2d 1166 (September 20, 1976) .. 8, 9, 10

Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y.) appeal sub.nom., Rabinovitch v. Nyquist, 45 U.S.L.W. 3007 (No. 75-1809) 8, 9, 10

Skehan v. Board of Trustees of Bloomsburg State College, 538 F. 2d 53 (CA 3, 1976) (U.S.S.C. No. 76-409, Petition Pending); prior appeal, 501 F. 2d 31 ..... 10, 11

Vaughn v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 838 (1962) 11

Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed. 2d 214 (1975) 12

Constitutional Provisions

Eleventh Amendment to the Constitution of the United States 8

Statutes

42 U.S.C. § 1983 6

42 U.S.C. § 2000-5 (k) 7

Other Authorities

S. 2278, "The Civil Rights Attorney's Fees Awards Act of 1976" 2, 8

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) 3, 4, 5

H. R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) .. 5, 6, 8

H. R. 15460, "The Civil Rights Attorney's Fees Awards Act of 1976" 6

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Respondents.

MOTION TO FILE AMICUS CURIAE BRIEF

NOW COMES the State of Illinois by William J. Scott, Attorney General for the State of Illinois and respectfully moves this Honorable Court for leave to file the Brief of the State of Illinois, *Amicus Curiae*. In support of this Motion, it is averred that the subject matter of the appeal at bar is of immediate and vital consequence to your *Amicus*; That your *Amicus* was not advised of the pendency of this cause until a date subsequent to the

time when leave was not required herein; That the Brief of your *Amicus* submits certain Congressional references and other critical authorities not available at that prior date; That your *Amicus* believes that these additional references will be of assistance to this Honorable Court and all parties hereto.

Respectfully submitted,

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State of Illinois.

By _____
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Attorney for Amicus Curiae

Subscribed and sworn to before me
this 26th day of October, 1976.
My Commission expires 11-27-77.

_____
Notary Public

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BRIEF OF THE STATE OF ILLINOIS AMICUS CURIAE

INTEREST OF THE AMICUS

The decision of this Honorable Court in the appeal at bar will have an immediate impact on each of our fifty states. Your *Amicus*, the State of Illinois, is vitally concerned that the integrity of the Eleventh Amendment to the Constitution of the United States be maintained. Toward this objective your *Amicus* respectfully submits its brief.

ARGUMENT

NO AWARD OF ATTORNEY'S FEES IS APPROPRIATE UNDER 42 U.S.C. § 1983 IN THE ABSENCE OF STATUTORY AUTHORIZATION.

On May 12, 1975, this Court rendered its noted decision in *Alyeska Pipeline Service Co. v. The Wilderness Society, et al.*, 421 U.S. 420, 44 L.Ed.2d 141, 95 S.Ct. 1612. In the Opinion delivered by Mr. Justice White, it was held that:

> Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some, but not others. But it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former. If the statutory limitation of right-of-way widths involved in this case is a matter of the gravest importance, it would appear that a wide range of statutes would arguably satisfy the criterion of public importance and justify an award of attorneys' fees to the private litigant. And, if *any* statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigants in actions under 42 USC § 1983 [42 USCS § 1983] seeking to vindicate *constitutional* rights?

On September 29, 1976, the United States Senate passed Bill S. 2278, "The Civil Rights Attorney's Fees Awards Act of 1976." 122 Cong. Rec. S. 17053 (daily ed., September 29, 1976). On October 1, 1976 it was passed by the United States House of Representatives, and is now pending Presidential approval. This Bill provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "The Civil Rights Attorney's Fees Awards Act of 1976."

SEC. 2. That the Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

(*id.*, 122 Cong. Rec. S 17053)

In S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), the Committee on the Judiciary stated the purpose of this Bill:

> This amendment to the Civil Rights Act of 1866, Revised Statutes Section 722, gives the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws. (*id.* at p. 1)

The Committee further stated that:

> . . . in *Alyeska*, the United States Supreme Court, while referring to the desirability of fees in a variety of circumstances, ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the

"private attorney general" theory. The Court expressed the view, in dictum, that the Reconstruction Acts did not contain the necessary congressional authorization. This decision and dictum created anomalous gaps in our civil rights laws whereby awards of fees are, according to *Alyeska*, suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights. Likewise, fees are allowed in a suit under Title II of the 1964 Civil Rights Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. § 1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws.

> This bill, S. 2278, is an appropriate response to the *Alyeska* decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent.

(*Id.*, S. Rep. No. 94-1011 at p. 4)

Respecting its power to authorize awards of attorney's fees, the Report declared that this was done ". . . in cases covered by S. 2278 in accordance with Congress' powers under, *inter alia*, The Fourteenth Amendment, Section 5." (*id.*, S. Rep. No. 94-1011 at p. 5)

With respect to the scope of this authorization, the Report noted that:

> . . . defendants in these cases are often State, or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

(*id.*, S. Rep. 94-1011 at p. 5, footnotes omitted)

Thus, this pending legislation directly bears on the appeal at bar.

In the decision below, it was held that:

> This appeal presents the question of whether the eleventh amendment bars the assessment of attorney's fees against state officials sued in their official capacity under 42 U.S.C. § 1983, (*Bond v. Stanton*, 528 F.2d 688, 689 (1976)) [Emphasis added]

In the Judiciary Committee Report on Senate Bill 2278, it was expressly noted that attorney's:

> . . . fees are allowed in a suit under Title II of the 1964 Civil Rights act challenging discrimination on a private restrainment, but NOT [allowed] in suits under 42 U.S.C. §1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws. (*id.*, S. Rep. No. 94-1011, at P. 4 emphasis added)

Similarly, in H. R. Rep. No. 94-1558, it was observed that:

> Section 1983 is utilized to challenge official discrimination, such as racial segregation imposed by law. *Brown v. Board of Education*, 347 U.S. 483 (1954). It is ironic that, in the landmark *Brown* case challenging school segregation, the plaintiffs could not recover their attorney's fees, despite the significance of the ruling to eliminate officially imposed segregation.
>
> * * *

> . . . The Civil Rights Attorney's Fees Awards Act of 1976, would amend Section 722 (42 U.S.C. 1988) allow the award of fees in certain Civil Rights cases. It would apply to actions brought under . . . Section 1983 . . . (*id.*, at pp. 4-5).

This House Report was submitted by the Committee on the Judiciary concerning H.R. 15460, which proposed an amendment nearly identical to that of the Senate, as follows:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs. (*id.*, H.R. Rep. 94-1558 at p. 11)

After adoption of this amendment, the House Report concluded that:

> The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.
>
> * * *
>
> Of course, the 11th Amendment is not a bar to awarding of counsel fees against state governments. *Fitzpatrick v. Bitzer*, ... US ....., 96 S.Ct. 2666 (June 28, 1976).
>
> (*id.*, H.R. Rep. 94-1558 at p. 7.)

Thus, the explicit provisions of § 1983 are understood as presently containing NO consent to award of attorneys fees. This was the conclusion of both Committees on the Judiciary in the United States Senate and House of Representatives. For precisely that reason, § 1983 was expressly included in both Senate Bill 2278 and House Bill 15460. Without such inclusion, and until approval by the President, it is *in*appropriate to award such fees under § 1983.

The decision of this Court in *Fitzpatrick v. Bitzer*, ... U.S. ....., 49 L.Ed.2d 614, 96 S.Ct. 2666 (June 28, 1976) also addresses this "threshhold fact of Congressional authorization." In *Fitzpatrick*, the ". . . District Court held that the Connecticut State Employees Retirement Act violated Title VII's prohibition against sex-based employment discrimination." (*id.*, 49 L.Ed.2d 614, at 618). Title 42 U.S.C. § 2000e-5(k) provides that:

> In any action or proceeding under this subchapter [Title VII of the Civil Rights Act of 1964] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Based upon this express Congressional authorization, this Court held in *Fitzpatrick, supra*, that:

> We think that Congress may, in determining what is "appropriate legislation for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are consitutionally impermissible in other contexts [under the Eleventh Amendment]. See *Edelman v. Jordan, supra; Ford Motor Co. v. Department of Treasury, supra* (id., Fitzpatrick, 49 L.Ed.2d at 622)

In contrast, the Opinion rendered by Mr. Justice Rehnquist in *Fitzpatrick, supra*, also explains that in *Edelman v. Jordan*, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974):

> The Civil Rights Act of 1871, *42 USC § 1983* [42 USCS § 1983], had been held in Monroe v. Pope, 365 US 167, 187-191, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961) to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendants. The provisions of the Social Security Act relied upon by plaintiffs [*in Edelman*] were held by their terms not to "authorize suit

against anyone" 415 US, at 674, 39 L.Ed.2d 662, 94 S.Ct. 1347, and they, too, were incapable of supplying the predicate for a claim of waiver [of the 11th Amendment] on the part of the State, (*id.*, *Fitzpatrick*, 49 L.Ed.2d at 619)

Thus, the Reports of the Committees on the Judiciary for the United States Senate and House are consistent with the decision of this Court in *Fitzpatrick, supra.* The ". . . Eleventh Amendment, and the principle of State Sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." (*Fitzpatrick, supra,* 49 L.Ed.2d 614 at 62). When and if § 1983 is amended under the "plenary" authority of the Fourteenth Amendment to permit award of attorney's fees, the Eleventh Amendment will *then* be a bar.

Two other recent decisions by the Third and Fifth Circuit Courts of Appeals also require this same conclusion. On September 20, 1976, the Fifth Circuit rendered its decision in *Jagnandan v. Giles, President of Mississippi State University,* 538 F.2d 1116 (September 20, 1976)

In that case, it was found below that the State of Mississippi had enacted a statute requiring payments of higher out-of-state tuition rates by all aliens residing in Mississippi. This statute was held unconstitutional. (379 F.Supp. 1178) However, the three-judge district court declined to award payment of the excess tuition to the prevailing aliens. Instead, it followed the decision of this Court in *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

On appeal, the *Jagnandan* Court of Appeals affirmed. In doing so, the impact of both *Fitzpatrick v. Bitzer,* 49 L.Ed.2d 614, *supra,* and *Manclet v. Nyquist,* 406 F.Supp. 1233 (W.D.N.Y.), appeal *sub nom. Rabinovitch v. Nyquist,* 45 U.S.L.W. 3007 (U.S. July 13, 1976) (No. 75-1809) was considered at length.

In the *Jagnandan* Court's examination of *Rabinovitch, supra,* it was noted that the specific issue is:

> Does Fourteenth Amendment, of its own force, constitute limitation on sovereign immunity bar of Eleventh Amendment so that, even absent specific statutory declaration authorizing money judgment against state in suit brought to enforce Fourteenth Amendment rights, federal court may enter judgment awarding money damages against state where, in its discretion, such relief is necessary and appropriate to fully vindicate constitutional rights and to deter future violations of constitutional proscriptions?
> (45 U.S.L.W. 3007) (U.S. July 13, 1976). (Cited in ftn. 46, 538 F.2d at 1185)

Addressing this issue in a concurring opinion, Circuit Judge Goldberg asserted that:

> The Congress cannot realistically be expected to provide fully adequate remedies for every fourteenth amendment violation, because such violation often reflect the type of overreaching that tempts all governments . . .
>
> Although it is clearly appropriate for the federal sovereign to muscularize the potency of the fourteenth amendment through selective repeal of the eleventh amendment, *see Fitzpatrick v. Bitzer, supra,* primacy of individual rights requires more than section 5 for full and lasting effectuation. Absent strong countervailing indications from Supreme Court cases, I would hold that in situations like the one before us, the fourteenth amendment of its own force has acted to repeal the eleventh amendment *pro tanto.*
>
> * * *
>
> This most important issue may be frontally addressed and authoritatively resolved in *Rabinovitch* or in some other case in the near future. The question certainly merits direct and definitive Supreme Court attention. Through this concurring opinion, I sound a note of supplication that the

> Court might consider the wisdom of rejecting the implications of *Edelman* that we have found controlling, and of holding that the eleventh amendment has been modified to the extent necessary fully to effectuate the sweeping mandate of the fourteenth amendment. (*id.*, 538 F.2d at 11, 1189-1190)

Despite this perspective of *Rabinovitch*, the *Jagnandan* Court held that the decision in *Fitzpatrick v. Bitzer* could not be controlling. It found that:

> Different from the case at bar was the presence in *Fitzpatrick* of federal legislation authorizing federal courts, under Title VII, to award money damages in favor of private individuals and against a state found to have discriminated in employment on the basis of race, religion, color, sex or national origin. ___ U.S. at ___, 96 S.Ct. 2666. *See* 42 U.S.C.A. § 2000e-2(a). This legislation had been passed pursuant to § 5 of the Fourteenth Amendment. Similarly in *Edelman* there was no express congressional legislation. Thus *Fitzpatrick* found a situation wholly unpresent in *Edelman*. The Court in *Fitzpatrick* indicated that without this particular legislation the case would be governed by *Edelman*. (*id.*, *Jagnandan*, 538 F.2d at 1180)

Consequently, the court concluded:

> No enforcing legislation is involved in the instant case. The very fact that the *Fitzpatrick* Court relied on legislation, authorized by the enabling section of the Fourteenth Amendment, supports the necessity of such legislation for recovery of money from the state by a person whose Fourteenth Amendment rights have been violated. Authority cited by the Court in *Fitzpatrick* mandates this requirement. *See Ex parte Virginia*, 100 U.S. (10 Otto.) 339, 347, 25 L.Ed. 676 (1880) . . . Absent further direction from the Supreme Court, and where no section 5 legislation has been passed, our holding here is in keeping with this historical balance placed upon a coterminous recognition of the Eleventh and Fourteenth Amendments. (*id.*, *Jagnandan*, 538 F.2d at 1185)

In addition to *Jagnandan*, a second illuminating decision has been recently rendered by the Third Circuit after remand in *Skehan v. Board of Trustees of Bloomsburg St. College*, 538 F.2d 53 (CA 3, 1976) (U.S.S.C. No. 76-409, Petition Pending). In *Skehan*, it was found that the plaintiff was a non-tenured Associate Professor of Economics at Bloomsburg State College in Pennsylvania. After termination by the college, Skehan initiated an action under 42 U.S.C. § 1983, seeking reinstatement, back pay, punitive damages and attorney's fees. On Appeal, the Court of Appeals held Skehan to be a private attorney general. It instructed the District Court to consider an award of back pay and attorney's fees if the college did not possess sovereign immunity. (*Skehan v. Board of Trustees*, 501 F.2d 31, CA 3, 1974). On appeal by Skehan to this Court, the cause was remanded for further consideration in light of the *Alyeska Pipeline* decision, *supra*. In its decision after remand, the Court of Appeals observed that:

> Skehan also urges that on remand he would be able to show that all of the defendants, but in particular President Nossen, acted in bad faith, vexatiously, wantonly, or for oppressive reasons, states of mind which Skehan contends permit an award of attorney's fees under the American rule. The particular reference to Nossen, a prime mover in his termination but hardly a prime mover in carrying on this litigation, suggests the need for distinguishing between the bad faith which may have led to the termination of employment and bad faith, vexatiousness or oppression in litigating. It is the latter which comprises the predicate for the well-recognized fourth exception to the American rule on fee awards. The fee is awarded in the nature of costs for vexatiously bringing or maintaining an unfounded action or defense. 6 J. Moore, Federal Practice ₱ 54 77[2] at 1079 (2d ed. 1974) (*id.*, 538 F.2d 53 at 57)

After considering the decision of this Court in *Vaughn v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 888 (1962), the *Skehan* Court held that:

> Since the obduracy ground for a fee award may still arise in this case, we hold that attorney's fees may be awarded as costs against a sovereign otherwise immune, if it pursues a bad faith, vexatious, wanton or oppressive course of litigation, but may not be awarded against an immune sovereign as damages because of pre-litigation obduracy on the authority of *Vaughan v. Atkinson*,
>
> * * *
>
> We also instruct the district court to consider whether an award of attorney's fees would be appropriate against any of the individual defendants for bad faith, vexatious, wanton or oppressive conduct both prior to and during the course of this litigation, and against the college for such conduct subsequent to the commencement of the litigation. (*id.*, 538 F.2d 53 at 58-59, 63)

Thus, the dichotomy is clear. An individual state official can render himself personally liable for "pre-litigation obduracy"

> . . . under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the . . . [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. [Wood v. Strickland] 420 U.S. at 322, 95 S.Ct. at 1001. (Cited in *Skehan, supra*, 538 F.2d 53 at p. 60).

Conversely, that individual official acting in bad faith cannot render a sovereign state liable for these prelitigation acts. This reasoning recognizes that it is the very commencement of litigation which, perforce, initiates the participation of the state's attorney general. Such

commencement requires both an evaluation and response respecting the legal posture of the state. Thus, an opportunity is thereby afforded to the state to correct erroneous or oppressive administrative acts by individual officials. If any "bad faith, vexatious, wanton or oppressive course of litigation" were *then* pursued, an award of compensatory attorney's fees would be mandated. Correspondingly, the bad faith acts of individual officials prior to litigation would not render sovereign states liable as being "acts in their official capacities." Instead, such awards of attorney's fees for "pre-litigation obduracy" would be recognized as really being impositions of punitive damages against state funds. Thus, the decision of this Court in *Edelman v. Jordan, supra*, would continue as the benchmark absent congressional acts to the contrary.

CONCLUSION

Your *Amicus* therefore respectfully urges that the Eleventh Amendment be held to bar an award of attorneys' fees against treasuries of the respective States in the absence of appropriate statutory authorization.

Respectfully submitted,

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